STATE OF MICHIGAN

IN THE SUPREME COURT

TAMMY McNEIL-MARKS,

Plaintiff/Appellee,

v.

MIDMICHIGAN MEDICAL CENTER-GRATIOT,

Defendant/Appellant.

Supreme Court No. 154159
Court of Appeals No. 326606
Circuit Court No. 2014-11876-NZ
Hon. Randy L. Tahvonen

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PLAINTIFF/APPELLEE'S SUPPLEMENTAL BRIEF

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INTRODUCTION

This Court has asked the parties to further brief the issue by filing supplemental briefs, "addressing whether the plaintiff's communication with her attorney constitutes a report to a public body within the meaning of MCL § 15.361(d) and MCL § 15.362 such that it is protected activity under the Whistleblowers' Protection Act, MCL § 15.361 et seq." (January 24, 2017, Supreme Court Order).

The Plaintiff hereby submits the following as a supplement to the legal analysis and evidentiary support which was submitted to the Court in her response in opposition to Defendant's application.

The Plaintiff would note preliminarily that the facts and circumstances which exist in the present case are unique in nature and are not the sort of facts likely to occur frequently if at all. Specifically, the Plaintiff was in the midst of a pending court proceeding regarding a personal protection order involving a third-party to the above-captioned lawsuit. The communication at issue pertained to a suspected violation of the personal protection order by that third-party while that individual was at the Plaintiff's workplace, and the communication was made by the Plaintiff to an attorney that was involved in the personal protective order proceedings at the time the suspected violation took place.

The Plaintiff again requests that the application be denied.

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SUPPLEMENTAL STATEMENT OF FACTS

The Plaintiff hereby incorporates the statement of facts contained within her response in opposition to Defendant's application.

SUPPLEMENTAL ARGUMENT

I. THE COURT OF APPEALS PROPERLY FOUND THAT PLAINTIFF'S COMMUNICATION TO HER ATTORNEY CONSTITUED A REPORT TO A PUBLIC BODY WITHIN THE MEANING OF MCL § 15.361(d) AND MCL § 15.362.

It is respectfully submitted that the Whistleblowers' Protection Act broadly defines what constitutes a public body:

> Sec. 1. As used in this act:
>
> ****
>
> (d) **"Public body" means all of the following**:
> (*i*) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government.
> (*ii*) An agency, board, commission, council, member, or employee of the legislative branch of state government.
> (*iii*) A county, city, township, village, intercounty, intercity, or regional governing body, a council, school district, special district, or municipal corporation, or a board, department, commission, council, agency, or any member or employee thereof.
> (*iv*) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body.
> (*v*) A law enforcement agency or any member or employee of a law enforcement agency.
> (*vi*) The judiciary and any member or employee of the judiciary.

MCL § 15.361(d).

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As this Court has explained in the context of the Whistleblowers' Protection Act, the State Legislature is presumed to have intended the meaning expressed in unambiguous language contained within a statute and judicial construction is not permissible. Brown v. Mayor of Detroit, 478 Mich. 589, 593, 734 N.W.2d 514, 516 (2007). In its opinion, this Court also disapproved of and overruled a footnote from an earlier decision from this Court wherein additional requirements were suggested beyond what was set forth in the plain language of the Whistleblowers' Protection Act. Brown v. Mayor of Detroit, 478 Mich. 589, 594, n. 2, 734 N.W.2d 514, 517 (2007).

By the plain language of the Whistleblowers' Protection Act an individual is a public body so long as the individual falls within one of the six subsections to MCL § 15.361(d).

Without any legal authority, the Defendant in its application seeks to create a distinction between a "public body" and "agency". Indeed, MCL § 15.361(d) utilizes, the word "agency" within the definition of public body as inclusive rather than as a distinction. Appellate Courts including this Court have also used the words "agency" and "public body" interchangeably when discussing what constitutes a public body under MCL § 15.361(d) as illustrated by the following excerpt from this Court's opinion:

> The WPA protects an employee who reports or is about to report a violation or suspected violation of a law or regulation to *a public*

> *body*. MCL 15.362. The language of the WPA does not provide that this public body must be an outside agency or higher authority. There is no condition in the statute that an employee must report wrongdoing to an outside agency or higher authority to be protected by the WPA.

Brown v. Mayor of Detroit, 478 Mich. 589, 594, 734 N.W.2d 514, 517 (2007), see also Ernsting v. Ave Maria Coll., 274 Mich. App. 506, 510, 736 N.W.2d 574, 579 (2007).

Regardless, this Court has noted the fact that the State Bar of Michigan is a public body created by state law:

> The State Bar is an organization established under state law to which all attorneys who wish to practice law in Michigan must belong. The State Bar is a "public body corporate."
>
> ****
>
> "The State Bar of Michigan is the association of the members of the bar of this state, organized and existing as a public body corporate pursuant to powers of the Supreme Court over the bar of the state." State Bar Rule 1

State Bar Solicitation for Political Action Committees, 612 N.W.2d 401 (2000).

The statute states:

> The state bar of Michigan is a public body corporate, the membership of which consists of all persons who are now and hereafter licensed to practice law in this state. The members of the state bar of Michigan are officers of the courts of this state, and have the exclusive right to designate themselves as "attorneys and counselors," or "attorneys at law," or "lawyers." No person is authorized to practice law in this state unless he complies with the requirements of the supreme court with regard thereto.

MCL § 600.901. The word agency does not appear anywhere within MCL § 600.901.

The Defendant in its application seeks to have this Court ignore the fact that the State Legislature expressly established the State Bar of Michigan as a public body. In making its arguments, the Defendant urges this Court to insert and/or infer exclusionary language into MCL § 15.361(d) with regards to the State Bar of Michigan in seeking to create a distinction between the State Bar of Michigan and other public bodies. In effect, the Defendant seeks to have this Court re-write history and re-write this state's statutes and find that the State Bar of Michigan was not established as a public body by the State Legislature notwithstanding the clear language of MCL § 600.901. Had the State Legislature sought to exclude a public body like the State Bar of Michigan from MCL § 15.361(d), the State Legislature could have done so by including statutory language to that effect.

The Court should note that the broad statutory language contained within MCL § 15.361(d) has been acknowledged by appellate courts. In the case of Ernsting v. Ave Maria Coll. the Court of Appeals was asked to address the question of whether or not federal agencies constituted a public body within the definition of MCL § 15.361(d):

> We first consider whether a federal agency, as opposed to a state or local agency, may be considered a public body under the WPA.

Ernsting v. Ave Maria Coll., 274 Mich. App. 506, 510, 736 N.W.2d 574, 579 (2007).

Like the Defendant in the present case, the defendant in Ernsting urged the appellate court to limit the scope of statutory definition of public body so as to exclude federal agencies from the scope of the public body definition contained within MCL § 15.361(d). Ernsting v. Ave Maria Coll., 274 Mich. App. 506, 736 N.W.2d 574 (2007).

The Court of Appeals in Ernsting ultimately concluded that the statutory definition of public bodies in MCL §15.361(d) encompassed federal agencies as well as state and local agencies. Ernsting v. Ave Maria Coll., 274 Mich. App. 506, 512, 736 N.W.2d 574, 580 (2007). The Court should note that leave to appeal was sought to this Court by the defendant in that case and said request was denied with this Court concluding that the Court of Appeals in Ernsting had to look no further than the plain language of MCL § 15.361(d) in properly determining that federal agencies are public bodies pursuant to the Whistleblowers' Protection Act. Ernsting v. Ave Maria Coll., 480 Mich. 985, 742 N.W.2d 112m (2007).

The Court of Appeals in Ernsting also noted that it is improper to add language into the statute:

> Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, and a dictionary may be consulted for this purpose." Polkton Charter Twp. v. Pellegrom, 265 Mich.App. 88, 102, 693 N.W.2d 170 (2005). Black's Law Dictionary

> (8th ed.) defines "law enforcement" as "[t]he detection and punishment of violations of the law. This term is not limited to the enforcement of criminal laws." Clearly, the function of detecting and punishing violations of the law is not performed solely by state and local agencies, which is reflected in the express language of MCL 15.361(d)(*v*). Nothing in MCL 15.361(d)(*v*) demonstrates the Legislature's intent that the term "law enforcement agency" is limited to state or local enforcement agencies. " '[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.' " Hill v. Sacka, 256 Mich.App. 443, 447–448, 666 N.W.2d 282 (2003) (citation omitted).

Ernsting v. Ave Maria Coll., 274 Mich. App. 506, 512, 736 N.W.2d 574, 580 (2007). Indeed, this Court has likewise concluded that unambiguous statutory language is to be applied as written by the State Legislature. Brown v. Mayor of Detroit, 478 Mich. 589, 593, 734 N.W.2d 514, 516 (2007)

Like the Defendant in the present case, the defendant in Ernsting sought to ignore the unambiguous statutory language by urging the appellate court to consider the legislative history. In rejecting the defendant's arguments, the Court of Appeals in Ernsting also noted the following:

> Moreover, because MCL 15.361(d)(*v*) is unambiguous, we reject as unpersuasive defendant's argument that the legislative history and House Legislative Analysis, HB 5088 and 5089, February 5, 1981, reflect a legislative intent to limit the definition of "public body" to state and local agencies. It is well settled in Michigan that legislative analysis is a "generally unpersuasive tool of statutory construction," Frank W. Lynch & Co. v. Flex Technologies, Inc., 463 Mich. 578, 587, 624 N.W.2d 180 (2001), particularly given that the analyses themselves carry a warning " 'that they do not constitute an official statement of legislative intent,' " Morales v. Parole Bd., 260 Mich.App. 29, 43, 676 N.W.2d 221 (2003), quoting Lynch, supra at

> 588 n. 7, 624 N.W.2d 180. In conclusion we hold that under the plain language of MCL 15.361(d), a federal agency may qualify as a law enforcement agency and, thus, as a public body under the WPA.

Ernsting v. Ave Maria Coll., 274 Mich. App. 506, 514–15, 736 N.W.2d 574, 581 (2007).

Accordingly, the Court of Appeals in the present case properly concluded that the State Bar of Michigan was a public body pursuant to the Whistleblowers' Protection Act. Even if this Court was to look beyond MCL § 600.901, which was cited by the Court of Appeals in rendering its opinion, and conclude that the State Bar of Michigan is also an agency of the judiciary as argued by the Defendant in its application, the outcome of Plaintiff's appeal remains the same. Specifically, members of the judiciary are also a public body. MCL § 15.361(d)(vi). In fact, the plain language of the Whistleblowers' Protection Act does not contain limitation language preventing a finding that an individual is a member of a public body even though that individual may fall within one or more of the subsections contained within MCL § 15.361.

Not only is the State Bar of Michigan a public body, but the members of the State Bar of Michigan are also officers of the courts of the State of Michigan. MCL § 600.901. The Michigan judiciary has long held this view. "Attorneys practicing in district courts of this state are officers of the courts in which they practice." Ayres v Hadaway, 303 Mich 589, 596 (1942).

Regardless of whether this Court ultimately finds that Plaintiff falls within MCL § 15.361(d)(iv), MCL § 15.361(d)(vi) or perhaps both subsections, the Court of Appeals reached the right conclusion.

With regards to Plaintiff's activities, there can be no dispute that, at a minimum, a question of fact exists on whether Plaintiff's communication to the attorney constitutes a protected activity. Indeed, the Court of Appeals properly concluded that summary disposition should not have been granted as to that issue.

As noted by the Court of Appeals, there was no dispute that Plaintiff communicated with a member of the State Bar of Michigan, i.e. attorney Richard Gay. Indeed, evidence was submitted as to that fact. (See Exhibit 1 to Response to Application - Plaintiff's Deposition at 113; See also Exhibit 4 to Response to Application - Gay Deposition at 12). The Court of Appeals also noted that the substance of the conversation to the licensed attorney was that the Plaintiff believed that the person subject to the PPO was stalking her at her workplace. (See also Exhibit 1 to Response to Application - Plaintiff's Deposition at 113; See also Exhibit 4 to Response to Application - Gay Deposition at 12). As noted by the Court of Appeals, the evidence submitted established, at a minimum, that the Plaintiff in good faith made the report to the attorney of suspected violation of the law to a member of a public body.

RELIEF SOUGHT

For the reasons as set forth more fully above as well as in Plaintiff's response to Defendant's application for leave to appeal, the Plaintiff/Appellee again requests that this Honorable Court deny Defendant's application for leave to appeal.

Respectfully Submitted,

THE MASTROMARCO FIRM

Dated: March 7, 2017

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PROOF OF SERVICE

STATE OF MICHIGAN)

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COUNTY OF SAGINAW)

I hereby certify that on **March 7, 2017**, I presented the Plaintiff/Appellee's Supplemental Brief to the Michigan Supreme Court for filing and uploading to the Electronic Filing system which will send notification of such filing to the following: SARAH K. WILLEY an ECF participant. I hereby certify that I have mailed by United States Postal Service the document to the following non-ECF participants: N/A

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Dated: March 7, 2017

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